No. 85-1259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD LUNN TULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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1. The Government asserts that the Seventh Amendment right to trial by jury is automatically inapplicable if *either* the cause of action *or* the remedy is equitable in nature. *See* Gov't Br. at 10, 17. The Government, however, cites no decision of this Court as authority for this proposition. In considering the applicability of the Seventh Amendment to modern statutory enactments, this Court has not artificially dissected the statute into cause of action and remedy, but rather has considered more generally whether "the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974). In doing so, the Court has emphasized that "[a]lthough the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time." *Id.* at 193.

The Government attempts to defeat the right to jury trial in this case by artificially dividing the civil penalty action under the Clean Water Act into cause of action and remedy, and separately analyzing each component as if the other were irrelevant. Such a wooden approach leads to absurd results when, as here, a statute creates one cause of action but provides several distinct forms of relief. The Clean Water Act provides equitable, legal, and criminal relief. *See* 33 U.S.C. §§ 1319(b) (equitable), 1319(d) (legal), 1319(c) (criminal). The Government's characterization of the underlying cause of action as equitable cannot defeat the right to jury trial under the Seventh Amendment when the Government seeks what is plainly legal relief. Indeed, the Government's approach is belied by the well-established doctrine that the presentation of legal claims in equitable actions does not result in forfeiture of the right to jury trial. *See Ross* v. *Bernhard*, 396 U.S. 531, 538 (1970) ("legal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit"); *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916) ("penalty of triple damages" cannot be enforced "otherwise than through the verdict of a jury in a court of common law").

In *Curtis* v. *Loether*, *supra*, this Court emphasized that the nature of the relief was more significant than the cause of action in determining whether a modern statutory enactment implicated the right to jury trial preserved by the Seventh Amendment. In holding that an action under the Civil Rights Act of 1968 seeking injunctive relief and actual and punitive damages must be tried to a jury on demand, the Court stated that "this cause of action is analogous to a number of tort actions recognized at common law." 415 U.S. at 195. The Court went on to note: "*More important*, the relief sought here —actual and punitive damages—is the traditional form of relief offered in the courts of law." *Id.* at 196 (emphasis supplied). If the Government's approach of separately analyzing the cause of action and the remedy were the correct one, the nature of the relief in *Curtis* v. *Loether* could not have been "[m]ore important" than the nature of the cause of action in considering the applicability of the Seventh Amendment.

2. Even if the Government's approach were correct, Tull would still be entitled to trial by jury, because both the cause of action and the relief in this case are legal in nature. With respect to the cause of action, the Government contends that an action to recover civil penalties is most analogous to one to cure a public nuisance. This purported analogy overlooks the very question presented in this case—whether the Seventh Amendment applies when the Government seeks monetary penalties. For as the Government concedes the public nuisance cases on which it relies sought injunctive, not monetary, relief. Gov't Br. at 24 n.17. Tull does not dispute that if the Government sought only injunctive relief under 33 U.S.C. § 1319(b), he would not be entitled to a jury. The whole issue in this case, however, is whether Tull is entitled to a jury when the Government seeks monetary relief. In contending that public nuisance actions seeking only injunctive relief are the "closest historical analogue" to an action under the Clean Water Act seeking monetary relief, the Government simply ignores the key issue in the case.

The Government's analogy is also inapt because the District Court imposed civil penalties as punishment on Tull. *See, e.g.*, Pet. App. at 60a, 61a, 64a, 65a (District Court referring to civil penalty imposed on Tull as a "fine"). Under the cases cited by the Government, punishment in the form of civil penalties or otherwise was not a form of relief available to the equity courts to abate a public nuisance, absent contempt for failure to abide an injunction. Contrary to the Government's argument, courts of equity have never had inherent jurisdiction to impose penalties or forfeitures. *See, e.g.*,

Livingston v. *Woodworth*, 56 U.S. (15 How.) 546, 559-560 (1853); *Stevens* v. *Gladding*, 58 U.S. (17 How.) 447, 453-455 (1854). Indeed, cases on which the Government itself relies, *see* Gov't Br. at 22-23, clearly state that equity jurisdiction is not available for punishment. *See, e.g., Attorney General* v. *Tudor Ice Co.*, 104 Mass. 239 240 (1870) ("This Court, sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common law side of this court or of the other courts of the Commonwealth"); *Attorney General* v. *Johnson*, 2 Wils. Ch. 87, 96 (1819) ("there are many precedents showing that you may proceed in [the court of Exchequer] not for punishment but for prevention"). Civil penalties are a form of punishment and were imposed as such in this case. Such punishment was not available in an equitable action to abate a public nuisance.

Quite apart from the foregoing, it is noteworthy that the public nuisance case on which the Government most heavily relies—*Attorney General* v. *Richards*, 2 Anst. 603, 1 Ames. Eq. Jur. 615 (1795), *see* Gov't Br. at 22—actually supports Tull. The equity court in that case upheld its jurisdiction to issue a decree of abatement at the request of the Crown, but *only* on the ground that the Crown held title to the land at issue. The court conceded that it might *not* have the authority to issue the decree on the ground of nuisance only, "at least not without the intervention of a jury." 2 Anst. at 615.[1] The

[1] As the court stated:

> But it is argued, that the prayer of the bill being to abate the erections as a nuisance, the Court can only consider that question, as alone supporting the relief prayed; and it is contended, that this Court cannot give such a decree, or at least not without the intervention of a jury, the question of nuisance being, as laid down by Lord Hale, a question of fact, and not of law. *That may be, where the question is of nuisance only, and the evidence doubtful.* But the cases cited * * * clearly prove, that where the king claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it. [2 Anst. at 615-616 (emphasis supplied).]

That the case turned on the ownership of the land by the Crown is clear from the concluding sentence of the opinion, in which the court stated, "we do not hesitate to declare, that the soil is the property of the Crown; and of course, to decree, that these buildings be abated." *Id.* at 616.

facts of *Richards* are thus clearly not "remarkable similar" to those of the present case, Gov't Br. at 22, since Tull—not the Government—owns the land at issue. Nor is the question in *Richards* at all similar to that in this case, since there was in *Richards* no question of monetary relief. Finally, the opinion in *Richards* strongly supports Tull, since it suggests that if the Crown did not own the land and sought relief on the basis of nuisance only, "the intervention of a jury" would be required.

As detailed in petitioner's opening brief, a civil penalty action is most analogous not to a public nuisance action seeking no monetary relief, but rather to historic actions by the government to collect a penalty. *See* Pet. Br. at 18-25. Such actions were suits at common law, tried as ordinary actions in debt. *See, e.g., Lees v. United States*, 150 U.S. 476, 479 (1893) ("the recovery of a penalty * * * may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil court"). In any such case "[t]he defendant was, of course, entitled to have a jury summoned * * *." *Hepner* v. *United States*, 213 U.S. 103, 115 (1909).

3. The Government also errs in contending that monetary civil penalties are equitable rather than legal relief. Monetary relief is, of course, the prototypical relief afforded by a court of law, as injunctive relief is the prototypical relief afforded by a court of equity. The Government seeks to overcome the logical conclusion that the

monetary relief of a civil penalty is a legal remedy by arguing that the amount of the penalty is not fixed. Gov't Br. at 34-36. The amount of punitive damages awardable under the statute at issue in *Curtis* v. *Loether*, *supra*, was also not fixed, but that did not prevent this Court from holding that such relief, together with actual damages, "is the traditional form of relief offered in the courts of law," triggering the right to jury trial. 415 U.S. at 196. As explained in petitioner's opening brief, at 34-35, juries routinely fix penalties from a broad range of possibilities, under appropriate instructions. There is no reason why this should be any different with respect to the amount of civil penalties under the Clean Water Act.[2]

The Government contends that there can be no right to a jury in this case because the amount of any monetary relief depends on the exercise of discretion, and only a judge sitting in equity can exercise such discretion. Gov't Br. at 26-29. This argument was made at some length by the petitioner in *Curtis* v. *Loether*, and not accepted by this Court.[3] Particularly where the amount

[2] The Government's suggestion that the EPA Penalty Policy somehow evinces congressional intent to restrict the right to jury trial is wholly unfounded. *See* Gov't Br. at 26-27. The Penalty Policy was not even formulated by the EPA until 1977—five years *after* enactment of the statute at issue here—and there is no evidence in the legislative history of amendments to the statute remotely implying that Congress viewed the Policy as precluding the right to a jury trial.

[3] The remarkable similarity between the Government's arguments in this case and the unsuccessful arguments of petitioner in *Curtis* v. *Loether* is underscored by comparing the Government's Brief, at 28-29, with the following passage from Brief for Petitioner, *Curtis* v. *Loether*, at 37-39:

> There is no absolute right to actual or punitive damages such as existed at common law, for these matters are entrusted to the discretion of the court. * * * Congress intended that the forms of relief authorized by Title VIII be employed as part of a single interrelated equitable remedy, and the significance for Seventh Amendment purposes of any relief awarded must be assessed in this context. Where the statute contemplates that actual or punitive damages will only be awarded at the court's discretion and in light of its decisions as to injunctive relief, it would be error to attempt to evaluate the legal or equitable nature of such damages in isolation from such discretion and decisions. In granting relief under the analogous provisions of Title VII, the courts have used great flexibility in devising remedies to eradicate employment discrimination, and this remedial arsenal has been held to be equitable, even when a monetary award is made in a particular case. * * * Considered as part of a single integrated equitable remedy, the relief in any particular case is *ipso facto* equitable and does not give rise to a right of trial by jury.

of penalties that may be imposed in the exercise of discretion is so staggering—up to $22 million in this case—the protection of having a jury rather than a single judge exercise that discretion is all the more necessary.

The Government also contends that the monetary relief awarded in this case did not trigger the Seventh Amendment right to jury trial because the relief was analogous to disgorgement. Gov't Br. at 31-32. There is, however, nothing in the civil penalty provision of the Clean Water Act suggesting that such penalties should be limited to disgorgement, or that disgorgement is an appropriate measure of the amount of penalty. The record in this case also refutes the Government's attempted analogy. The District Court acknowledged that Tull received no profit from filling numerous lots in Mire Pond I and Mire Pond II, but nevertheless imposed a $35,000 fine for this filling. Pet. App. 60a. The District Court imposed a civil penalty of $5,000 for Tull's filling the property at Eel Creek even thoungh Tull had not sold this property at any profit at all. *Id.* at 36a, 60a. The District Court did not equate the amount of the civil penalties imposed to any profit received by Tull, and clearly

intended not simply to disgorge profit but to impose punishment. Tull was fined for filling land for which he received *no profit*, and the Government's argument that the imposition of civil penalties constituted equitable disgorgement is thus unsupported not only by the statute but by the record as well.

4. The Government contends that Tull should be denied his Seventh Amendment right to a jury trial on the Government's claim for monetary relief because such relief was "an adjunct to equitable relief." Gov't Br. at 38. Even if a potential penalty of $22 million and an actual penalty in excess of $300,000 can be considered a mere "adjunct" to equitable relief—rather than vice versa—the Government's attempt to revive the "equitable clean up doctrine" in this context is contrary to the teachings of *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962). In those cases this Court affirmed that the Seventh Amendment right to jury trial on legal claims could not be defeated simply because such claims were combined with claims for equitable relief.

As the Court stressed in *Ross* v. *Bernhard*, 396 U.S. 531, 538 (1970), "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." If an action by the Government seeking civil penalties is legal in nature—as Tull maintains, and as the Government assumes for purposes of its "adjunct" argument, *see* Gov't Br. at 36—surely the Government cannot defeat the Seventh Amendment right that attaches to such a claim by the simple expedient of appending a catch-all claim for any equitable relief that may be appropriate. This is particularly true when, as here, any claim for equitable relief was largely moot from the outset. *See* Pet. at 3 & n.1.

5. The Government concludes its brief by arguing that the Court should decline to find the Seventh Amendment applicable in this case "as a prudential matter." Gov't Br. at 42. The Government's position is not unlike that of the Crown in the Eighteenth Century, which sought to deny the colonists their right to trial by jury by employing vice-admiralty courts, in which the jury trial right did not exist. This deprivation of the jury trial right was specifically mentioned in the Declaration of Independence[4] and led to resistance to ratification of the Constitution until a commitment to preserve the right to trial by jury was made.[5]

This commitment is embodied in the Seventh Amendment and should not be disregarded because of the Government's assertion that interposing a jury between the citizen and the imposition of millions of dollars in penalties would interfere with the efficient implementation of a congressional scheme. The Government does not satisfactorily demonstrate how denial of trial by jury will frustrate the objectives of the Clean Water Act. Civil penalties will continue to be available under the Act, assessed by a jury and not a judge as required by the Seventh Amendment. The Government is free to seek and the court free to impose any equitable relief that may be appropriate without the "interference" of the jury. This Court has consistently refused to dispense with constitutional rights upon the Government's assertion that it is necessary for governmental efficiency. *INS* v. *Chadha*, 462 U.S. 919, 944 (1983). As the Court concluded in *Curtis* v. *Loether*, 415 U.S. at 198, such "considerations are insufficient to overcome the clear command of the Seventh Amendment."

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[4] "For depriving us, in many cases, of the benefits of Trial by jury." The Declaration of Independence para. 20 (U.S. 1776).

[5] *See The Federalist* No. 83, at 499 (A. Hamilton) (C. Rossiter ed. 1961) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government").

For the foregoing reasons, and those in petitioner's main brief, the judgment below should be reversed.

Respectfully submitted,

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